POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, Appellant, vs. WASHINGTON STATE DEPARTMENT OF ECOLOGY and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondents.	PCHB NO. 09-023 STIPULATION AND JOINT MOTION TO STAY

Appellant Puget Soundkeeper Alliance ("PSA"), and respondents Department of Ecology ("Ecology") and Washington State Department of Transportation ("WSDOT"), hereby jointly move for the entry of this Stipulation and Joint Motion to Stay pending completion of the permit modification described herein. Upon completion of such permit modification on the terms described in this stipulation, PSA will move for dismissal of all remaining issues in this appeal.

STIPULATION

1. Counsel and the staff of the parties have engaged in extensive settlement discussions relating to the Clean Water Act stormwater permit that is the subject of this appeal, and wish to resolve this matter without the expense and burden of continued litigation. The parties agree that this settlement is in the public interest as well as the parties' interests, and

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that entry of this stipulation, and dismissal upon completion of the permit modification process described herein, is the most appropriate means by which to resolve this case.

2. Ecology hereby agrees to propose to modify the permit to include the following language as a new section 5.4 of the WSDOT SWMP (Appendix 7 to the permit):

> WSDOT will continue to ensure compliance with Endangered Species Act ("ESA") requirements intended to protect fish species through participation in ESA § 7 consultation with NOAA Fisheries and U.S. Fish and Wildlife Service ("Services") where required. Where § 7 consultation is not required due to the absence of federal funding or other nexus, WSDOT will consult, in writing, with the Services on projects with potential stormwater impacts to listed fish species. WSDOT will provide the Services with all available information developed by WSDOT to determine biological effects, and seek concurrence in an effects determination before proceeding with construction of the project.
>
> This consultation requirement will apply only to those projects in western Washington that construct new impervious surfaces, and are located in geographic areas where there are listed fish species present. WSDOT will provide its information used to make an effects determination to the Service[s] for a 30-day review period. If the Services do not concur within 30 days of receipt of the project information, WSDOT will either (a) continue consultation in order to attempt to reach concurrence; or (b) adjust project funding and initiate ESA § 7 consultation. If the Service[s] do not respond within 30 days of receipt of the project information, WSDOT may proceed to construction.
>
> WSDOT will provide in each annual report a list of projects for which WSDOT consulted with the Services pursuant to this section and the outcome of that consultation.

3. Ecology agrees to propose to modify Condition S6.C. of the permit by substituting the following language:

> At least once every eighteen months, Ecology will modify this permit and/or issue an administrative order establishing new TMDL-related permit requirements for TMDLs associated with discharges from WSDOT facilities that EPA has approved during the preceding eighteen months. Ecology strongly encourages WSDOT to participate in development of TMDLs that are associated with discharges from its MS4.

4. Ecology agrees to propose to modify the permit by substituting the language contained in Appendix A of this Settlement Agreement for that in Section 3 and 3.1 of the WSDOT SWMP (Appendix 7 of the Permit).

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5. Ecology agrees to propose to modify the permit by substituting the language contained in Appendix B of this Settlement Agreement for that in Section 6.2 of the WSDOT SWMP (Appendix 7 of the Permit). This mandatory retrofit requirement will begin to take effect for projects being advertised for construction contracts in the 2011-13 biennium, which starts July 1, 2011, except for projects that have already received Design Approval as of July 1, 2010. It will also apply to two projects (I-5/M St. to Portland Ave.; I-5 Portland Ave. to Port of Tacoma Rd.) which may have design approval prior to July 1, 2010.

6. The current Section 6.2 of the SWMP, Opportunity–based Retrofits, will be re-titled "Opportunity-based Retrofits Outside the Puget Sound Basin" and re-numbered 6.3. Current Sections 6.3 through Section 6.5 will be re-numbered Sections 6.4 through 6.6 respectively.

7. Ecology shall release a proposed modified draft permit that includes all of the modifications agreed to in this stipulation within 45 days of the submission of this stipulation to the Board, and issue a final modified permit within 120 days from the date of the submission of this stipulation to the Board. Ecology shall promptly notify PSA and WSDOT if unanticipated delays as a result of the public comment period will delay issuance of a final modified permit, and will attempt to gain the agreement of the parties to issue a final modified permit beyond the 120 days specified above. The parties agree not to unreasonably withhold their agreement.

8. Ecology shall issue a new permit to WSDOT on or before March 6, 2014, the date the existing permit expires. To ensure compliance with this deadline, Ecology shall issue a public draft permit no later than November 6, 2013.

9. Ecology shall propose to modify S.8.E of the permit to include the following provisions:

> (8) WSDOT shall include in each Annual progress report a detailed accounting of all retrofitting work carried out under the permit, identifying work as falling under the project-triggered, opportunity-

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based, Puget Sound basin, or stand-alone retrofit categories. For each project under which retrofit work is carried out, the report shall disclose the amount of existing impervious surface area that was retrofitted. For retrofitting carried out pursuant to Section 6.2 of the WSDOT SWMP in which retrofitting all existing areas was deemed either infeasible or not cost-effective, the report shall include the cost information developed in order to ensure compliance with this requirement, and describe where and how much retrofitting took place. If money is transferred to fund stand-alone retrofit projects, these amounts will be included in the Annual progress reports.

(9) WSDOT shall include in each Annual progress report a list of all projects which add new impervious surface and exceed thresholds to comply with stormwater management requirements. The list will include a description of the BMPs employed at each project.

10. Upon completion of the permit modification process described herein, PSA will file a voluntary dismissal of this appeal within 30 days of the issuance of the modified permit. If Ecology fails to complete the permit modification on the schedule laid out herein, or if the final permit modification varies from that laid out herein, PSA may move to lift the stay and ask this Board to reschedule this case for hearing. Any motion to lift the stay and ask the Board to reschedule the case for hearing must be made no later than 30 days after Ecology issues a modified permit. If such a motion is not filed within 30 days of Ecology's issuance of a modified permit, the parties stipulate that the Board shall dismiss this appeal upon notification from Ecology.

11. The undersigned representatives of the parties certify that they are fully authorized by the party that they represent to enter into the terms and conditions of this Stipulation and legally to bind such party thereto. The parties consent to the submission of this Stipulation to the PCHB and its entry.

12. This agreement can only be modified upon written agreement of all parties. If any party realizes that it has, or will, breach this agreement, it shall promptly notify all other parties in writing.

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APPENDIX A

Section 3: Illicit Discharge Detection and Elimination

WSDOT's illicit discharge detection and elimination program is designed to identify and eliminate illicit discharges and illegal connections to WSDOT's MS4. An *illicit discharge* is a discharge of pollutants to the MS4 that is not comprised entirely of stormwater and is not authorized under the NPDES permit. Illicit discharges can include wash water, sediment, spilled chemicals, or a sewage spill to the MS4. An *illegal connection* is a pipe or other conveyance that has illegally been connected to WSDOT's MS4.

This section only addresses procedures for illicit discharges that are not classified as hazardous. For any identified illicit discharges that are potentially hazardous, WSDOT staff shall immediately contact the ESO's Hazardous Materials Program, or in the event of an immediate threat, contact 911.

Schedule. Illicit discharges and illegal connections will be identified on an ongoing basis by maintenance, construction, and design staff as well as field staff inventorying stormwater facilities. WSDOT's efforts to identify and report illicit discharges and illegal connections are an integral part of WSDOT's stormwater maintenance inspection and facilities mapping efforts pursuant to its SWMPP, as per the following list of SWMPP sections:

- As explained in *Sections 7.2.3* and *7.2.4*, the WSDOT *Maintenance Manual* calls for the inspection of the highway drainage systems at least twice per year.
- *Section 7.2.3* dictates that catch basin inspection will occur on an annual basis within 24 months after the effective date of the NPDES permit.
- *Section 7.2.4* dictates that inspection of permanent stormwater BMPs will occur on an annual basis within 36 months after the effective date of the NPDES permit.
- *Section 2.5* specifies that WSDOT will map all known municipal separate storm sewer outfalls and structural stormwater treatment and flow control BMPs it owns, operates, or maintains no later than five years from the effective date of this permit. This section further explains that mapping of outfalls and structural BMPs must continue on an on-going basis as additional outfalls are found, and as new BMPs are constructed or installed.

During the course of all these field activities, illicit discharges and illegal connections that are discovered will be reported for remediation.

Not all external discharges to WSDOT's MS4 are illicit. Discharges from an NPDES-permitted source and discharges from emergency fire fighting activities are allowed under Environmental Protection Agency regulations. Other non-stormwater discharges are conditionally allowed unless WSDOT identifies them as a significant contributor of pollutants to the MS4. These are generally not considered illicit discharges and include:

- Diverted stream flows
- Irrigation return flow

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- Rising ground waters
- Uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20))
- Uncontaminated pumped ground water
- Springs
- Flows from riparian habitats and wetlands
- Water line flushing
- Foundation drains
- Air conditioning condensation
- Water from crawl space pumps
- Footing drains
- Discharges from potable water sources, including water line flushing, hyperchlorinated water line flushing, fire hydrant system flushing, and pipeline hydrostatic test water. Planned discharges to a conveyance system or surface water will be de-chlorinated to a concentration of 0.1 ppm or less, pH-adjusted, if necessary, and volumetrically and velocity controlled to prevent re-suspension of sediments in the MS4.
- Discharges from lawn watering and other irrigation runoff. These will be minimized through, at a minimum, education activities for WSDOT maintenance staff and water conservation efforts.
- Street and sidewalk wash water, water used to control dust, and routine external building wash down that does not use detergents. WSDOT will reduce these discharges through, at a minimum, education activities and/or water conservation efforts. To avoid washing pollutants into the MS4, WSDOT must minimize the amount of street wash and dust control water used. At active construction sites, street sweeping must be performed prior to washing the street.
- Other non-stormwater discharges. The discharges must be in compliance with the requirements of the stormwater pollution prevention plan reviewed by the WSDOT, which addresses control of construction site de-watering discharges.

3.1 Illicit Discharge Identification

Illicit discharge detection and elimination programs for state transportation departments are substantially different that those for municipalities since:

- Fewer opportunities exist for cross connections between stormwater systems and sanitary sewer systems;
- Access to the right of way is generally controlled; and
- Department field crews and contractors provide on-going presence in the field to identify and report illicit discharges and illegal connections.

While public reporting plays a role, the identification of illicit discharges and illegal connections relies primarily on field observations reported from maintenance, construction, and design staff as well as crews inventorying and documenting stormwater management facilities and connection points. WSDOT staff will use the following indicators in the field to identify potential illicit discharges:

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- Visible signs of staining, residues, or oily substances in the water or detained within ditches, channels, catch basins, or surrounding pavement and soils
- Pungent odors coming from the drainage system (e.g., discharge smells like sewage, sulfide, petroleum/gas, rancid, etc.)
- Discoloration or oily substances in the water
- Abnormal water flow during the dry weather season
- Excessive sediment deposits or turbid waters, particularly near active off-site construction sites
- Floatables (e.g., discharge includes sewage, an oil sheen, suds, etc.)
- Broken concrete or other disturbances at or near junction structures

For reporting purposes, these observations shall be documented along with the date, time, location of discharge, and estimated quantity of the discharge along with any additional information describing the discharge. Refer to *Sections 7.2.1 and 7.3.1* for additional information.

In carrying out the SWMPP's stormwater facility mapping and documentation efforts (refer to *Section 2.5* for more information), stormwater drainages and connections emanating off the right-of-way will be assessed to determine whether they have a valid WSDOT utility permit and/or franchise authorizing the connection/discharge (refer to *Section 2.2.5* for more information).

(Note: subsections 3.2 to 3.5 remain unchanged)

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APPENDIX B

6.2 Requirements for Stormwater Retrofit in the Puget Sound Basin

a) On highway projects in the Puget Sound basin in **medium to high priority locations** for stormwater retrofit that add new impervious surfaces and exceed the threshold to comply with stormwater management requirements (per the Highway Runoff Manual), all existing impervious surfaces within the project limits must be retrofitted if feasible and cost effective.

- Retrofitting is *feasible* if there are no physical site limitations such as geographic or geologic constraints, steep slopes, soil instability, proximity to water bodies, presence of significant cultural resources, or shallow water tables (or other applicable factors contained in Appendix 2A of the Highway Runoff Manual – *Engineering and Economic Feasibility for Construction of Stormwater Management Facilities*).

- Retrofitting is *cost-effective* if the cost to retrofit all the existing impervious surfaces does not exceed 20% of the cost to meet stormwater requirements for the new impervious surfaces. The WSDOT region may request a variance from this limit for extenuating circumstances, such as the project is in a high priority location for retrofit, the project has realized reduced costs in other project elements, and/or the cost is not significantly above 20%.

If retrofitting is not feasible or cost-effective, one of the following must occur:

i. Retrofit the amount of existing impervious surface within the project limits that can be retrofitted for the amount of money equal to 20% of the cost to meet stormwater requirements for the new impervious surfaces;

ii. An equivalent amount of existing impervious surface will be retrofitted off-site, at a cost up to 20% of the cost to meet stormwater requirements for the new impervious surfaces; or

iii. An amount of money equal to 20% of the cost to meet stormwater requirements for the new impervious surfaces will be transferred to fund stand-alone stormwater retrofit projects.

b) On highway projects in the Puget Sound basin in **low priority locations** for stormwater retrofit that add new impervious surfaces and exceed the threshold to comply with stormwater management requirements, an amount of money equal to 20% of the cost to meet stormwater requirements for the new impervious surfaces will be transferred to fund stand-alone stormwater retrofit projects.

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